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72-1587

IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM, 1972

LOUIS GAZZOLA, Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No.

LOUIS GAZZOLA,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Louis Gazzola, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 2, 1973, which affirmed the judgement of the United States District Court for the Southern District of New York entered on a jury verdict, convicting the petitioner under an indictment charging him with, among other things,[1] of violating 18

1. Petitioner was named in a six count superseding indictment. The first count alledged a violation of Title 18 U.S.C. 922(h)(1). The second count alledged a violation of Title 18 U.S.C. App. 1202(a)(1), and counts three through six alledged violations of Title 18 U.S.C. 922(a)(1) The only questions sought to be reviewed by this court are those dealing with petitioner's conviction under count two which charged possession and receipt of a firearm "in commerce or affecting commerce" after previously being convicted of a felony. This also being the only issue raised in the Court of Appeals.

U.S.C. App. § 1202(a)(1) by possessing a firearm which was alleged to have a nexus with interstate commerce and of being a convicted felon.

Opinion Below

The Court of Appeals affirmed the judgement of the District Court without opinion. No opinions were rendered by the District Court with respect to the questions presented herein.

Jurisdiction

The judgement of the Court of Appeals was entered on May 2, 1973 (Appendix A, infra., p. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. When a defendant has been indicted on the charge of illegal possession of a firearm in violation of 18 U.S.C. App. § 1202(a)(1) by reason of him being a convicted felon and possessing and/or receiving a firearm which had sometime previously been shipped in interstate commerce:

(a) Is the question whether there is legally sufficient evidence against such defendant as to establish the required element of a "nexus" with interstate commerce by merely showing that a firearm had sometime infinitum previously traveled in interstate commerce?

(b) Is it an overextension of federal criminal jurisdiction to invoke 18 U.S.C. App. § 1202(a)(1) to prosecute a convicted felon for possessing and/or receiving a firearm which has no

other link to commerce except that it was shipped from its state manufacturer to a wholesaler in a different state 4 years and 7 months before defendant possessed it?

(c) What shall be the quantum of evidence required to establish "nexus" with interstate commerce so as to make out a prima facie violation of 18 U.S.C. App. § 1202(a)(1) for the possession and receipt offenses?

Statutory Provision Involved

The statute here involved is 18 U.S.C. App.§ 1202(a)(1), as set forth in Appendix C, infra. p. 5a.

Statement of the Case

The petitioner was arrested in Newburgh, New York, on July 7, 1972, by Special Agents of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms, acting pursuant to a warrant issued by a United States Magistrate for alleged violations of the Federal firearms laws.

On August 10, 1972, in the District Court for the Southern District of New York, an indictment was filed against the petitioner. Thereafter, on November 30, 1972, a superceding indictment was filed containing six counts. The first count alledging a violation of 18 U.S.C. § 922(h)(1), by the petitioner, being a convicted felon, transporting, possessing and/or receiving, on or about August 24, 1971, "in commerce or affecting commerce" a firearm. The second count alledging a violation of 18 U.S.C. App. § 1202(a)(1) by the petitioner, being a convicted felon, transporting, possessing and/or receiving, on or about August 24, 1971, "in commerce or affecting commerce" a firearm. The remaining four counts alledged violations of 18 U.S.C. § 922(a)(6) on or

about, August 24, 1971 by the petitioner making false statements likely to mislead a licensed firearms dealer.[2]

The Government's proof, under the second count of the indictment, established that a certain shotgun bearing serial number 128393 was manufactured by Winchester (Western Division of Olin Corporation) sometime prior to January 19, 1967 (11A-13A).[3] The firearms historical movement was traced by witnesses who testified from records, kept in the ordinary course of business, that this gun was shipped by Winchester from New Haven, Connecticut, on January 20, 1967, to a wholesaler, Roskin Brothers, located in Middletown, New York, and after remaining at rest at this location until October 23, 1968, Roskin Brothers shipped it to a retailer named M.F. Kinney in Newburgh, New York, where it remained until the petitioner purchased it on August 24, 1971 (21A-23A). It was stipulated at the time of trial that the petitioner was previously convicted of a felony.

The Government's own evidence showed that this firearm was not transported by the petitioner or any other person in interstate commerce during the period from January 25, 1967, through August 24, 1971. It was established that the gun remained within the confines of the State of New York for a period of four years and seven months prior to the petitioner's purchase.

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2. Wording in indictment is somewhat different.

3. Unless otherwise indicated, figures in parentheses followed by the letter "A" refer to pages of Appellants Appendix in the Court of Appeals, a certified copy having been filed with this court.

Rulings of District Court and Judgment of Court of Appeals

At the close of the Government's case, attorneys for petitioner moved for judgment of acquittal, on the second count of the indictment, on the basis of the insufficiency of the evidence, urging, among other grounds, that the Government's evidence did not establish that the firearm had a nexus with interstate commerce (36A, 37A)[4] The District Court denied that motion as well as the later motions made for judgment of acquittal and to set aside the verdict and for arrest of judgment at the close of the entire case and after the verdict (48A, 49A). The Court of Appeals affirmed without opinion.

REASONS FOR GRANTING THE WRIT

1. AS TO WHETHER THE MERE PROOF THAT A FIREARM WAS PREVIOUSLY IN INTERSTATE COMMERCE, REGARDLESS OF WHEN OR UNDER WHAT CIRCUMSTANCES, CAN PROPERLY SERVE TO SUPPLY THE REQUISITE EVIDENCE AND JURISDICTIONAL ELEMENT OF A NEXUS WITH INTERSTATE COMMERCE SO AS TO SUSTAIN A CONVICTION FOR A POSSESSION OR RECEIPT OFFENSE UNDER 18 U.S.C. App. § 1202(a)(1).

The questions here presented are worthy of review by this Court because (a) they concern the important matter of the proper criteria for determining the legal sufficiency of the evidence in the trial of a firearms prosecution under 18 U.S.C. App. § 1202(a)(1); (b) The judgment of the court below and

4. The District Court dismissed the first count of the indictment apparently finding that the defendant did not transport the firearm.

opinions of various courts of appeal and District Courts throughout the nation have decided an important question of federal law, which has not been, but should be settled by this court; (c) The matter is of particular importance as respects firearms prosecutions, such as this, under 18 U.S.C. App. § 1202(a)(1), affecting as it does the extent to which Federal Prosecutors will be able to invoke, that statute, as they are doing today with increasing frequency for possession and recent offenses.

Since this court's recent holding in United States v. Bass 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d. 488, it is the settled law that the Government must prove, in each individual case, that the firearm in question had a nexus with interstate commerce in order to have legally sufficient evidence to sustain a prosecution for transportation, possession and receipt offenses under 18 U.S.C. App.§ 1202(a)(1). It has been held by numerous Courts of Appeals and various District Courts that the Government meets this burden in both possession and receipt offenses, by merely showing that the firearm in question previously traveled in interstate commerce, regardless when or under what circumstances, see e.g., United States v. Giannoni, 472 F 2d 136 (9th Cir.), cert. den. – U.S. –; United States v. Brown, 472 F. 2d 1181 (6th Cir.); United States v. Mancino, 474 F. 2d. 1240, (8th Cir.); cert. pending since April 16, 1973; United States v. Snell, 353 F. Supp. 280; United States v. Glasgow, No. 4-72 Cir. 196 (D.C. Minn. August 26, 1972). Contra, United States v. Walker, 352 F. Supp. 113.

These holdings would seem to give the statute a curious reach permitting federal prosecutions to be invoked for all intrastate transactions, possessions and transportations in

states where no firearms were ever manufactured. It appears that a "mere possession" could not exist within these states and that within those states where guns are manufactured or have been manufactured, a convicted felon would purchase, transport, possess, or receive a firearm at his peril depending on its place of manufacture. These guidelines also permit federal prosecution of a felon who purchased, possessed or received a firearm manufactured within the state of possession which had at anytime previously been outside of the state regardless of when or under what circumstances. Thus giving the statute a reach over purely intrastate activity.

It was commenced by the Hon. Melvin E. Frankel, District Judge, during the trial of the instant case, there is some sort of visceral reaction to the reasoning that the requisite nexus in these type of prosecutions may be established by showing that the firearm previously traveled in commerce regardless of when.

> "THE COURT: . . . At what point would you say it's simply too remote in the past that this blunderbuss was shipped from Spain to Florida in 1628, and is still there, and somebody acquired it . . . It seems to me that there is some sort of visceral feeling that you ought to hold that some past time is too far in the past. . . . Assume that statute were fifty years old now and the interstate transportation took place forty years ago. My feeling would be that that is just too remote. If it took place last week, we would all feel very comfortable that that is recent enough. In between, you have something here approaching five years, which gets to feel pretty remote" (44A, 45A).

2. AS TO THE PERMISSABLE EXTENT OF POSSESSION AND RECEIPT PROSECUTIONS UNDER 18 U.S.C. App. § 1202(a)(1) WHICH MAY BE INVOKED SO AS TO MAINTAIN THE SENSITIVE BALANCE BETWEEN FEDERAL-STATE JURISDICTION.

The importance of the question here presented was recently reemphasized in United States v. Bass, supra, pp. 348, 349, when this court said:

> "Here, we conclude that Congress has not 'plainly and unmistakably,' United States v. Cradwell, 243 US 476, 485, 67 L. Ed. 857, 864, 37 S.Ct. 407 (1917), 61 L.Ed. 857, 864, made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.
>
> . . . unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance."

What is left now is an unclear area between "mere possession" of a firearm by a convicted felon and possession and/or receipt of a firearm having a nexus with interstate commerce.

As was said in United States v. Oclit, 343 F. Supp. 447, 448 (D. Hawaii, 1972)

". . . Part III of Bass is not a model of clarity. . ."

Part III gives examples of how the Government can meet its burden of establishing the firearms requisite nexus with interstate commerce.

The effect of those decisions holding that once in commerce, always in commerce, is to make certain firearms,

what might now be called, "nexus firearms," carrying with them a danger of Federal prosecution to a citizen who would want to follow a course of lawful conduct. See e.g., United States v. Hood, 343 U.S. 148, 149, 96 L.Ed. 846, 849, 72 S.Ct. 568.

The Government, on occasion, has argued that once in commerce the gun affects commerce and thereafter always has a nexus with interstate commerce. In United States v. Walker, supra p. 116, the court stated,

> "Since the firearm had been out of interstate commerce for approximately eleven months, it would strain the fabric of law beyond reason to say that the receipt of this firearm affected interstate commerce."

During trial, in the instant case, the judge said when pondering over the commerce nexus problem:

> "I only make one suggestion. It seems to me that might be a clue on which you could fashion some kind of rule *or which the Supreme Court may have to fashion some kind of rule.* But I don't want that to limit your imagination." (50A) (Emphasis added)

3. AS TO THE QUANTUM OF PROOF REQUIRED TO ESTABLISH THE ELEMENT OF A "NEXUS" WITH INTERSTATE COMMERCE SO AS TO INVOKE FEDERAL PROSECUTIONS FOR POSSESSION AND RECEIPT OFFENSES OF 18 U.S.C. App. § 1202(a)(1).

The important question here presented is one which has not yet been previously determined by this court as was stated by Mr. Justice Brennan in United States v. Bass, supra, p. 351, concurring in the opinion of this court, except for part III (referred to in this petition earlier).

"No question of the quantum of evidence necessary to establish the Government's prima facie case is before us and I would await a case properly presenting that question before deciding it."

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A
Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May, one thousand nine hundred and seventy-three.

Present:
HON. HENRY J. FRIENDLY,
Chief Judge
HON. PAUL R. HAYS,
Circuit Judge
HON. WILLIAM J. JAMESON,
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS GAZZOLA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of

record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

APPENDIX B
Judgment of United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Indictment 72 Cr. 1315

UNITED STATES OF AMERICA,

v.

LOUIS GAZZOLA,

Defendant.

On this 23rd day of January, 1973, came the attorney for the government and the defendant appeared in person and by Howard Finkelstein, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, willfully and knowingly, receiving, possessing and transporting in commerce and affecting commerce a firearm, to wit a Winchester Model 1400 shotgun, serial number 128393, (Title 18, U.S. Code Appendix Section 1202(a)(1)). Unlawfully, willfully and knowingly making a false and fictitious oral and written statement in that he represented that he had not been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, (Title 18, U.S. Code, Section 922(a)(6), as charged in counts 2, 3, 4, 5 and 6 and the court having asked the defendant whether he has anything to say why judgment

should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) MONTHS and fined $2,000.00 on count two (2). Imposition of sentence on counts 3, 4, 5, and 6 is suspended. Defendant is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Defendant is continued on present bail until 12:00 noon, February 9, 1973, at which time he is to surrender to the U.S. Marshall.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Marvin E. Frankel
United States District Judge.

s/ John Livingston
Clerk.

APPENDIX C
Statutory Provision Involved

18 U.S.C. 1202

Receipt, possession, or transportation of firearms — Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State of any political sub-division thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political sub-division thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1587

LOUIS GAZZOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner, a convicted felon, was convicted on one count of receiving a firearm transported in interstate commerce, in violation of 18 U.S.C. 922(h) and 18 U.S.C. App. 1202(a)(1), and on four counts of falsely denying that he was a convicted felon on forms used to purchase firearms, in violation of 18 U.S.C. 922(a)(6). He was sentenced to a term of imprisonment for six months and fined $2,000 for the violation of 18 U.S.C. 922(h) and 18 U.S.C. App. 1202(a)(1). Imposition of sentence on the other counts was suspended and, as to those counts, petitioner was placed on probation for three years. The court of appeals affirmed (Pet. App. A-1 to A-2). Petitioner challenges only his conviction under 18 U.S.C. 922(h) and 18 U.S.C. App. 1202(a)(1).

On August 24, 1971, petitioner purchased four shotguns at a sporting goods and auto parts store in Newburgh, New York. In making these purchases, petitioner filled out four separate forms, on each of which he stated that he had never been convicted of a felony. In fact, petitioner had been convicted of robbery in 1952. One of the guns had been purchased by the store from a gun distributor in Middletown, New York, which had obtained the gun in January 1967 from a firm in New Haven, Connecticut.

Petitioner contends that the government did not establish sufficient nexus with interstate commerce to sustain a conviction under 18 U.S.C. 922(h) and 18 U.S.C. App. 1202(a)(1). His contention is without merit. As this Court has held, "the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce." *United States* v. *Bass,* 404 U.S. 336, 350. See, also, *United States* v. *Giannoni,* 472 F. 2d 136 (C.A. 9), certiorari denied, April 16, 1973, No. 72-6140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07